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DISABILITY CLAIMS FOR ALCOHOL-RELATED MISCONDUCT

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INTRODUCTION

Two employees arrive at work half an hour late. It is both employees' first offense, and each is dealt with separately by the same supervisor. The first employee tells the supervisor that an alcoholic binge the preceding night caused her to oversleep. The supervisor fires her, explaining that it is company policy to terminate an employee who is late without a valid excuse. The second employee tells the supervisor that he is late for work because he overslept. This employee, however, receives only a verbal warning and suffers no further punishment.

Under traditional discrimination law, these facts would state a straightforward case of discrimination against the first employee on the basis of alcoholism. The employer's proffered reason for firing the first employee (oversleeping) would be considered a pretext—a false reason given by the employer to hide the true reason—and this would be proven by the employer's decision not to fire the otherwise similarly situated second employee. Under many courts' approaches to alcohol-related misconduct, though, the case of the first employee would be dismissed.

Alcoholism is a disability under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act.[1] The circuits, however, are split on whether the ADA and Rehabilitation Act cover employees' misconduct that arises because of their alcoholism.[2] This Article focuses on the possible claims of an alcoholic under the ADA, how different circuits approach alcohol-related employee misconduct, how the Supreme Court has implicitly dealt with the issue, and what the proper approach should be.

These issues arise in situations such as when an alcoholic employee misses work because of a hangover or because of still being drunk from the night before. This misconduct is the direct result of the employee's disability. Nevertheless, non-disabled employees are held accountable for this same misconduct. Would it be fair to allow alcoholic employees to get away with this type of misconduct, while not allowing the same result with non-disabled employees? If so, should an alcoholic's misconduct be excused indefinitely, or should employers be permitted to condition an alcoholic's future employment on successful rehabilitative treatment?

Courts have reached different results in answering questions similar to these. Most courts distinguish between the disability and disability-related misconduct. These courts hold that an adverse employment action because of disability-related misconduct is "Not Because of the Disability."[3] Other courts do not distinguish between the disability and the disability-related misconduct. These courts hold that an adverse employment action because of disability-related misconduct is "Because of the Disability."[4] In other disability cases, outside the disability-related misconduct context, courts only require the employee to

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[1] *See, e.g.*, Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990); Crewe v. U.S. Office Pers. Mgmt., 834 F.2d 140, 141 (8th Cir. 1987).

[2] *Compare* Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (holding that the ADA does not cover disability-related misconduct), *and* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997) (finding that the ADA does not cover alcoholism-related misconduct), *with* Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 515 (2d Cir. 1991) (holding that the ADA covers misconduct that arises because of the disability).

[3] *See, e.g.*, Pernice v. City of Chi., 237 F.3d 783, 784 (7th Cir. 2001).

[4] *See, e.g.*, *Teahan*, 951 F.2d at 514.

show evidence that creates an "Inference of" disability discrimination to prove his or her prima facie case.[5]

A student comment has provided a broad overview of how courts treat alcohol-related misconduct under the Rehabilitation Act and the ADA,[6] and a journal article has addressed disability-related misconduct in general.[7] Another author has addressed the difficulty of proving that alcoholism substantially limits a major life activity.[8] None of these articles, however, have analyzed the proper framework that courts should use to protect disabled alcoholic employees when these employees engage in alcohol-related misconduct.

This Article argues that courts should apply the "Inference of" approach to disability-related misconduct cases—that the duty to reasonably accommodate should arise when the employer suspects the misconduct is alcohol-related, and that the employer should be permitted to give an alcoholic employee a "firm choice" between rehabilitative treatment and termination. Part I sets out the statutory background of the ADA, looking at the different possible claims of an alcoholic employee. Part II describes how different courts have treated disability-related misconduct and other disability claims. Part III focuses on how the Supreme Court has addressed the issue and how that has affected the different approaches. Finally, Part IV analyzes which approach fits best with the goals of the ADA and which is best suited to deal with the needs of both the employer and employee. It also discusses what should constitute "reasonable accommodation" for the alcoholic employee and when it should be required.

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[5] *See, e.g.*, Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1021–22 (8th Cir. 1998).

[6] *See* James P. Sadler, Comment, *The Alcoholic and the Americans with Disabilities Act of 1990: The "Booze Made Me Do It" Argument Finds Little Recognition in Employment Discrimination Actions*, 28 TEX. TECH L. REV. 861, 872–73 (1997).

[7] *See* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 188–89 (2005).

[8] *See* Judith J. Johnson, *Rescue the Americans with Disabilities Act from Restrictive Interpretations: Alcoholism as an Illustration*, 27 N. ILL. U. L. REV. 169, 217–21 (2007).

I. BACKGROUND: ADA AND REHABILITATION ACT CLAIMS BASED ON EMPLOYEE MISCONDUCT

In 1990, approximately forty-three million Americans suffered from some physical or mental disability.[9] Unfortunately, these disabled Americans were being discriminated against by society in the employment context.[10] This unfair and unnecessary discrimination denied the disabled the equal opportunity to compete for employment, and cost the United States billions of dollars resulting from dependency and nonproductivity.[11] In an effort to address this discrimination, Congress enacted the Americans with Disabilities Act of 1990[12] and its predecessor, the Rehabilitation Act.[13]

A. Rehabilitation Act

The Rehabilitation Act was enacted in 1973[14] to provide rehabilitation for,[15] and to prevent discrimination against, disabled persons by affording them equal opportunities in federally-funded programs.[16] The ADA was modeled after the Rehabilitation Act[17] and should not be construed to apply a lesser standard.[18] The ADA was meant to expand to the private sector the protections of the Rehabilitation Act of 1973, which only protected employees of the federal government, the U.S. Postal Service, federal contractors, and entities receiving federal

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[9] 42 U.S.C. § 12101(a)(1) (2000).

[10] *See id.* § 12101(a)(2)–(3).

[11] *See id.* § 12101(a)(9).

[12] *See id.* §§ 12101–12213.

[13] *See* R. Bales, Student Article, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161, 167–68 (1992).

[14] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2, 1973 U.S.C.C.A.N. (87 Stat.) 409, 410–11 (codified as amended at 29 U.S.C. §§ 701–794 (2000)).

[15] *See* 119 CONG. REC. 24,571 (1973).

[16] S. REP. NO. 93-1297 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6373, 6388. For this reason, a disproportionately large number of Rehabilitation Act cases are public sector cases, mostly brought by employees of the United States Postal Service. That Rehabilitation Act defendants are often public sector employers, however, does not distinguish such cases from those in which the defendant is a private sector employer.

[17] *See* 29 U.S.C. §§ 705(2), 791, 793–94 (2000).

[18] 42 U.S.C. § 12201(a) (2000).

funds.[19] This allowed courts to use Rehabilitation Act authority to interpret the ADA.[20]

B. ADA Definitions

Title I of the Americans with Disabilities Act provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[21] The ADA only protects "qualified individual[s] with a disability."[22] A "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[23] A "[q]ualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[24] The law is well settled that alcoholism is a disability and that an alcoholic may be a "qualified individual with a disability"[25] as long as the alcoholism substantially limits a major life activity.[26]

The ADA explicitly allows an employer to hold an alcoholic or drug-addicted employee to the same qualification standards for employment or job performance and behavior to which it holds other employees, even if the alcoholic or drug-addicted employee's misconduct is related to the disability.[27] This makes it important to determine when an adverse employment action because of disability-related misconduct will constitute an ADA claim. To have an ADA claim, an employee must also prove, in addition to having a qualifying disability, that an adverse employment action was taken "because of the [employee's] disability."[28] If the employee is discriminated against "because

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[19] JOEL WM. FRIEDMAN, JR., THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS 870 (6th ed. 2007).

[20] 42 U.S.C. § 12201(a).

[21] *Id.* § 12112(a).

[22] *Id.*

[23] *Id.* § 12102(2)(A).

[24] *Id.* § 12111(8).

[25] *See, e.g.*, Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990); Crewe v. U.S. Office Pers. Mgmt., 834 F.2d 140, 141 (8th Cir. 1987).

[26] *See* Burch v. Coca-Cola Co., 119 F.3d 305, 316, 316 n.9 (5th Cir. 1997); *see also* Johnson, *supra* note 8, at 217 (asserting that "virtually all courts now generally find that alcoholics are not significantly limited in any major life activity").

[27] 42 U.S.C. § 12114(c)(4) (2000).

[28] *Id.* § 12112(a).

of . . . [a] disability," then the employee has three possible discrimination claims: disparate treatment, failure to provide reasonable accommodations, and disparate impact.[29]

C. *Types of Disability Claims*

1. Disparate Treatment

Disparate treatment is intentional discrimination on the basis of a disability.[30] It "is the most easily understood type of discrimination," where the employer treats a disabled employee less favorably than others because of that employee's disability.[31] An employer is only liable for disparate treatment when the disability actually motivated the employment decision.[32] Generally, the *McDonnell Douglas* burden-shifting framework applies to ADA disparate treatment claims.[33] Under that analysis, plaintiffs first carry the burden of raising a genuine issue of material fact for each element of their prima facie case.[34] To establish a prima facie case of discrimination under the ADA, many courts have held that plaintiffs must show "(1) that . . . [they are] disabled within the meaning of the ADA; (2) that . . . [they are] qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) that . . . [they were] discriminated against because of . . . [their] disability."[35] The burden-shifting approach was developed in Title VII cases to allow plaintiffs without direct evidence of discrimination to create an inference of discrimination using circumstantial evidence.[36] The problem with this version of an ADA prima facie case is that it requires plaintiffs to prove that they were discriminated against because of their disability, which requires direct evidence.[37] Recognizing this problem, some courts have changed the third element of a plaintiff's prima facie case to require the plaintiff to make a

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[29] Davidson v. Am. Online, Inc., 337 F.3d 1179, 1188–89 (10th Cir. 2003).

[30] *Id.* at 1188.

[31] Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).

[32] *Id.*

[33] *Davidson*, 337 F.3d at 1189.

[34] *Id.*

[35] *Id.* at 1188 (quoting McKenzie v. Dovala, 242 F.3d 967, 969 (10th Cir. 2001)).

[36] Timmons, *supra* note 7, at 196; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[37] Timmons, *supra* note 7, at 196–97.

showing that gives rise to an "inference of" discrimination on the basis of the disability.[38]

Under this analysis, "[i]f [the] plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for its employment decision."[39] If the employer-defendant is successful in articulating "a nondiscriminatory reason, [then] the burden shifts back to [the] plaintiff to show . . . [that] the defendant's reason for the adverse employment action is pretextual."[40]

The disparate treatment theory furthers the goal of equal treatment of disabled employees, while the reasonable accommodation and disparate impact theories further the goal of equal opportunity.[41] The latter two theories require the employer to change its policies when the equal treatment of all employees denies disabled employees equal opportunity.[42]

2. Reasonable Accommodation

A discrimination claim can also be made under the ADA for failing to provide a reasonable accommodation.[43] This is because the ADA defines discrimination in part as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[44] The ADA also prohibits denying employment opportunities to an otherwise qualified individual with a disability because that individual would require reasonable accommodation.[45]

Generally, employees must inform the employer of their disability and request an accommodation before the employer must accommodate them.[46] This duty of reasonable accommodation is prospective because an employer must

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[38] Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 395 (N.D. Iowa 1995) (emphasis omitted).

[39] *Davidson*, 337 F.3d at 1189.

[40] *Id.*

[41] *See* Timmons, *supra* note 7, at 198.

[42] *See id.*

[43] *See Davidson*, 337 F.3d at 1188–89.

[44] 42 U.S.C. § 12112(b)(5)(A) (2000).

[45] *See id.*

[46] *See* Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1092 (7th Cir. 2000).

accommodate only the known limitations of the disability.[47] This also means that an employer is not required, as part of its duty of reasonable accommodation, to give an employee a "second chance" after being terminated.[48]

3. Disparate Impact

Under the disparate impact theory, discrimination on the basis of a disability includes the use of "qualification standards . . . or other selection criteria that screen out or tend to screen out an individual with a disability."[49] Disparate impact claims arise when an employment practice is neutral on its face but, in effect, it is harsher on a protected group and it cannot be justified by business necessity.[50] Under this theory, "a facially neutral employment practice may be [illegally discriminatory] without evidence of the employer's subjective intent to discriminate, which is required in a 'disparate treatment' case."[51] A disparate impact claim, however, cannot be brought by an alcoholic or drug-addicted employee because the ADA explicitly allows employers to hold alcoholic and drug-addicted employees to the same standards as other employees.[52] This means that a facially neutral policy will not be an ADA violation, even if that policy has a harsher effect on alcoholics or drug addicts than it does on other employees. ADA disparate impact claims will not be discussed further in this Article because they are barred to alcoholic employees.

II. APPROACHES TO DISABILITY-RELATED MISCONDUCT

Federal courts have held that alcoholism is a protected disability under the ADA and Rehabilitation Act,[53] and it is clear that Congress intended it that way.[54] However, alcohol-related

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[47] *See* Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1107 (Fed. Cir. 1996).

[48] *See* Burch v. Coca-Cola Co., 119 F.3d 305, 320 (5th Cir. 1997).

[49] Davidson v. Am. Online, Inc., 337 F.3d 1179, 1189 (10th Cir. 2003) (citing 42 U.S.C. § 12112(b)(6)).

[50] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).

[51] *Id.* at 52–53.

[52] 42 U.S.C. § 12114(c)(4).

[53] *See, e.g.*, Renaud v. Wyo. Dep't of Family Servs., 203 F.3d 723, 729–30 (10th Cir. 2000); Fuller v. Frank, 916 F.2d 558, 561 (9th Cir. 1990); Crewe v. U.S. Office Pers. Mgmt., 834 F.2d 140, 141 (8th Cir. 1987).

[54] *See generally* Johnson, *supra* note 8, at 171 nn.9–10.

misconduct is not always protected. Employees fired for alcohol-related misconduct are limited to two of the three possible ADA claims. They are prohibited from bringing a disparate impact claim,[55] so they must rely on disparate treatment and reasonable accommodation claims. These two claims must receive the proper safeguards; otherwise alcoholic employees could end up being a protected class under the ADA and Rehabilitation Act with no claim for discrimination. The circuits are split on the proper approach to disparate treatment and reasonable accommodation claims when the adverse employment action is because of alcoholic-related misconduct.

A majority of courts make it difficult, if not impossible, for employees fired for alcohol-related misconduct to bring disparate treatment claims because these courts require employees to prove through direct evidence that they were fired because of their disability and not due to their misconduct. These courts have a per se rule that an adverse employment action because of alcoholic-related misconduct is "Not Because of the Disability."[56]

Other courts have a per se rule that an adverse employment action because of alcoholic-related misconduct is "Because of the Disability."[57] This allows employees to establish a prima facie case of disability discrimination if they are "otherwise qualified." This prevents the employer from using the misconduct as a legitimate, nondiscriminatory reason because it is not distinguished from the disability. One scholar has argued that the Supreme Court implicitly has rejected this approach.[58]

Some courts, outside of the disability-related misconduct context, require employees to prove that they were terminated under circumstances giving rise to an inference of disability discrimination.[59] Applied to the alcohol-related misconduct context, this "Inference of" approach allows employees fired for alcohol-related misconduct to prove a prima facie case with circumstantial evidence of disability discrimination. It allows the

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[55] 42 U.S.C. § 12114(c)(4).

[56] *See* Pernice v. City of Chi., 237 F.3d 783, 784 (7th Cir. 2001).

[57] *See* Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 513 (2d Cir. 1991).

[58] *See* Timmons, *supra* note 7, at 235.

[59] *See* Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1021, 1023 (8th Cir. 1998) (explaining how an employee "must present evidence that 'creates a reasonable inference that [his disability] was a determinative factor in the adverse employment decision' ").

employer to offer the misconduct as a legitimate, nondiscriminatory reason, while also giving the employee the opportunity to prove that the reason given is merely a pretext for disability discrimination.

As discussed in Part I, the only other possible claim the employee fired for alcoholic-related misconduct may have is a reasonable accommodation claim. Some courts require the employee to put the employer on notice before the employer has a duty to reasonably accommodate. Other courts place this duty on the employer once the employer suspects the misconduct is reasonably related to a disability.

A. Disparate Treatment

1. "Not Because of the Disability" Approach

In the alcoholism and drug-addiction context, most courts have distinguished the disability from disability-related misconduct. For example, in *Pernice v. City of Chicago*, Daniel Pernice, a drug addict employed by the City of Chicago's Department of Aviation ("City of Chicago"), was arrested and charged with possession of cocaine.[60] The City of Chicago charged Pernice with several violations of city personnel rules because of his arrest and he was subsequently terminated.[61] Pernice filed a complaint contending that his "drug addiction created a wholly involuntary need to possess drugs," and that he was terminated because of this compulsion.[62] The Seventh Circuit rejected this argument, distinguishing between a cause and a compulsion.[63] The court found that even if his drug addiction created an involuntary need to possess drugs, he nonetheless made a conscious choice to actually possess them.[64] Therefore, the court had little trouble separating the misconduct from the disability and allowing the employer to punish for misconduct without discriminating because of the disability.[65]

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[60] *Pernice*, 237 F.3d at 784.

[61] *Id.*

[62] *Id.* at 785.

[63] *Id.* at 786. To illustrate the difference between a cause and a compulsion, the *Pernice* court discussed its holding in *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995), where it agreed with a worker's argument that his alleged alcoholism caused him to lose his license. *Id.*

[64] *Id.* at 787.

[65] *Id.*

Similarly, in *Little v. F.B.I.*, a special agent with the FBI was terminated after numerous off-duty incidents resulting from his alcoholism, culminating with being intoxicated while at work.[66] The plaintiff then brought a claim under the Rehabilitation Act, alleging that he was fired because of his alcoholism, while the FBI claimed he was fired for his misconduct of being intoxicated at work.[67] The lower court found that the plaintiff was actually terminated because of his inability to conform to the FBI's established standards by coming to work intoxicated, not because he was an alcoholic.[68] The Fourth Circuit agreed, and determined that his discharge was because of his misconduct, not his alcoholism.[69]

Some circuits have held that absenteeism is misconduct and therefore unprotected by the ADA. For instance, in *Leary v. Dalton*, a Navy employee was fired for missing work because he was incarcerated after being arrested for driving while intoxicated ("DWI").[70] The plaintiff argued that he was fired due to his disability, because his alcoholism had led to his DWI causing his excessive absences, which led to his termination.[71] The First Circuit disagreed, holding that he was fired for breaking reasonable Navy rules against unapproved absences and not because of his alcoholism.[72]

These courts failed to go through the correct burden-shifting framework and seemed to apply a per se rule that these employees were fired because of their misconduct and "Not Because of their Disability." This rationale leaves the employees unable to make the causal connection required for a disparate treatment claim. Many of these courts have relied on the provision of the ADA that allows employers to hold alcoholic employees to the same behavior and performance standards that they hold other employees, even if the misbehavior is related to the alcoholism.[73] The ADA provision, however, only explicitly prohibits disparate impact claims because it allows employers to hold alcoholic employees to the same standards as other

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66 Little v. F.B.I., 1 F.3d 255, 256–57 (4th Cir. 1993).
67 *Id.* at 257.
68 *Id.* at 259.
69 *Id.*
70 Leary v. Dalton, 58 F.3d 748, 750 (1st Cir. 1995).
71 *Id.* at 751.
72 *Id.* at 754.
73 *Id.*

employees, even if the misconduct is related to the alcoholism.[74] This prohibits employees from bringing claims when the employer has facially neutral standards that have a disparate impact on alcoholic employees.

This ADA provision, however, does not allow employers to intentionally discriminate against employees because they are alcoholics. Furthermore, the cases discussed above involve either illegal conduct or conduct prohibited by workplace rules, which are both valid reasons for employee termination. In cases where the misconduct is not so egregious, such as absenteeism or tardiness caused by alcoholism, the employee must be protected from pretextual discrimination by applying the proper burden-shifting analysis. For example, the alcoholic employee from the introductory hypothetical should be given the opportunity to prove that the reason given for his or her termination was a pretext for the actual reason of being an alcoholic. The courts in *Pernice*, *Little*, and *Leary*, though, would say that once the employer has shown that the employee has engaged in misconduct, the case is over and the termination is per se "Not Because of the Disability."

2. "Because of the Disability" Approach

a. Teahan v. Metro-North Commuter Railroad Co.

Not all courts hold that disability-related misconduct falls completely outside the protection of the ADA. In *Teahan v. Metro-North Commuter Railroad Co.*, John Teahan, an alcoholic, was employed by Metro-North Commuter Railroad ("Metro-North") as a telegraph and telephone maintainer.[75] Between 1983 and 1988, his alcoholism and drug abuse led to excessive unexcused absences.[76] On March 7, 1986, Teahan voluntarily enrolled in a 30-day rehabilitation program, but after being discharged from the program, he relapsed into further drug and alcohol abuse resulting in continued absences.[77] Metro-North responded to Teahan's continued unauthorized absences with progressive discipline, including warning letters and

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[74] 42 U.S.C. § 12114(c)(4) (2000).

[75] Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 513 (2d Cir. 1991).

[76] *Id.*

[77] *Id.*

suspensions.[78] Teahan finally informed Metro-North of his substance abuse problem in the late fall of 1987.[79]

Teahan was absent without permission for four days in December of 1987, and on December 28, 1987, Metro-North sent a charge letter notifying him that his continued unauthorized absences constituted excessive absenteeism.[80] On that same day, before receiving the letter, Teahan had voluntarily entered into a second substance abuse rehabilitation program, which he successfully completed.[81] Following the charge letter, Metro-North pursued Teahan's dismissal under the collective bargaining agreement disciplinary procedures.[82] It was only because of this collective bargaining agreement that Teahan was permitted to return to work on January 28, 1988, while his dismissal was being reviewed.[83] Teahan was not absent from work again until his appeals were exhausted and he was successfully dismissed by Metro-North on April 11, 1988.[84]

Teahan sued under section 504 of the Rehabilitation Act claiming that Metro-North discriminated against him by firing him " 'solely by reason of' his handicap."[85] The district court granted Metro-North's motion for summary judgment, holding that Metro-North had not relied on Teahan's disability and had fired him for his excessive absenteeism, "a nondiscriminatory reason."[86] This shifted the burden to Teahan to prove that Metro-North's asserted reason was pretextual.[87] Teahan failed to meet this burden; therefore, Metro-North was granted summary judgment.[88]

Teahan appealed, arguing that his absenteeism was "caused by" his substance abuse problem and since his termination was based on that excessive absenteeism, the district court improperly shifted the burden to him to prove pretext.[89] The Second Circuit agreed, holding that termination by an employer

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78 *Id.*
79 *Id.*
80 *Id.*
81 *See id.*
82 *See id.*
83 *See id.*
84 *See id.*
85 *Id.* at 514.
86 *Id.*
87 *See id.*
88 *Id.*
89 *Id.*

which is based on absenteeism that is "shown to be caused by substance abuse is termination 'solely by reason' of that substance abuse for purposes of" the Rehabilitation Act.[90]

The *Teahan* court reasoned that allowing an employer to "rely" on any conduct that is disability-related would allow the employer to avoid the burden of proving that the disability is relevant to the job qualifications.[91] It found that disability-related misconduct becomes relevant when determining whether the employee is "otherwise qualified," but not when determining the reason for the termination.[92] The relevant inquiry, the court stated, was into the causal connection between the absences and the alcohol abuse.[93] If the employee's alcoholism caused only a small percentage of the absences, and a significant number of the absences were caused by something else, then the termination would not be "solely by reason of" the disability.[94]

b. Office of the Senate Sergeant at Arms v. Office of the Senate Fair Employment Practices

Other courts have also supported the minority view that the relevant inquiry for disability-related absenteeism is to determine whether the employee is "otherwise qualified" and not to determine the reason for the termination.[95] In *Office of the Senate Sergeant at Arms v. Office of the Senate Fair Employment Practices*, William L. Singer was employed by a branch of the Office of the Senate Sergeant at Arms ("SAA") as a dispatcher.[96] Although his performance at work was excellent, he had a problem with violating SAA's attendance policy.[97] After receiving notice of termination for his excessive absences on October 28,

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[90] *Id.* at 517; *see* Mercado v. N.Y. City Hous. Auth., No. 95 CIV. 10018(LAP), 1998 WL 151039, at *12 (S.D.N.Y. Mar. 31, 1998) (questioning whether *Teahan* still survives under the ADA because its holding was based on the pre-1992 Rehabilitation Act, which did not contain the ADA provision explicitly authorizing employers to hold employees with alcoholism or drug addiction to the same conduct standards as other employees).

[91] *Teahan*, 951 F.2d at 517.

[92] *Id.*

[93] *See id.*

[94] *Id.*

[95] *See* Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1106 (Fed. Cir. 1996); Fritz v. Mascotech Auto. Sys. Group, Inc., 914 F. Supp. 1481, 1489 (E.D. Mich. 1996).

[96] *See Office of Senate Sergeant at Arms*, 95 F.3d at 1104.

[97] *See id.*

1993, Singer told his supervisor the reason for his absences was his alcoholism, which he had previously denied.[98] The SAA imposed a last-chance agreement on Singer, which required him to attend a substance dependency recovery program.[99] Nonetheless, this agreement did not provide for retroactive relief, and so Singer filed an employment discrimination claim.[100]

The Court of Appeals for the Federal Circuit determined that an alcoholic employee, whose only problem in performing the essential job functions was his ability to regularly report to work, was able to regularly report to work when he was reasonably accommodated by being allowed to attend treatment. Therefore, he was considered a "qualified individual with a disability."[101] The court also found that a "firm choice" between treatment and discipline was consistent with a reasonable accommodation.[102] Like the majority of courts, *Office of the Senate Sergeant at Arms* treated attendance as an essential function of the job;[103] however, unlike the majority, it put more of an emphasis on the ADA's more expansive concept of "the employer's duty to reasonably accommodate the disabled employee."[104]

Both *Teahan* and *Office of the Senate Sergeant at Arms* held that termination for disability-related absenteeism was "Because of the Disability" if the employee was otherwise qualified.[105] The court in *Office of the Senate Sergeant At Arms*, however, limited its holding to absenteeism, while *Teahan* seems to apply to all disability-related conduct.[106] Both *Teahan* and *Office of the Senate Sergeant at Arms* support the theory that disability-related absenteeism should be analyzed when determining whether the employee is qualified for the job and should not be

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98 *See id.*

99 *See id.*

100 *See id.*

101 *Id.* at 1106.

102 *Id.* at 1107.

103 *Id.* at 1106.

104 *See* Sadler, *supra* note 6, at 872.

105 *See Office of Senate Sergeant at Arms*, 95 F.3d at 1106; Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 517 (2d Cir. 1991) (holding that "termination by an employer . . . which is justified as being due to absenteeism shown to be caused by substance abuse is termination 'solely by reason of' that substance abuse").

106 *Compare Office of Senate Sergeant at Arms*, 95 F.3d at 1106, *with Teahan*, 951 F.2d at 517.

separated from the actual disability.[107] *Office of the Senate Sergeant at Arms*, though, focuses more on whether the employee is qualified with reasonable accommodation,[108] which is more consistent with the ADA's requirement of reasonable accommodation than both the majority approach and *Teahan*.[109]

3. "Inference of" Approach

In other ADA cases outside the alcoholism context, some circuits have applied a variation on the third element of an employee's prima facie case. Rather than require employees to prove they were fired "because of" their disability, these courts require employees to prove only that they were fired under circumstances that raise an "inference of" disability discrimination. For instance, in *Young v. Warner-Jenkinson Co.*, Robert Young, a maintenance employee at Warner-Jenkinson Company, Inc. ("Warner-Jenkinson"), suffered a severe work-related injury that led to part of his foot being amputated.[110] Young was eventually cleared to come back to work without restrictions on March 28, 1995.[111] In December of that same year, Warner-Jenkinson informed Young that it had decided to terminate him because of deficient job performance.[112] Young filed a disability discrimination charge with the U.S. Equal Employment Opportunity Commission ("EEOC").[113] In response to an inquiry by the EEOC, Warner-Jenkinson sent a letter stating that Young was terminated because of lack of available work and not because of performance deficiencies.[114] The district court granted summary judgment for Warner-Jenkinson, and Young appealed, arguing that he was terminated because of his disability in violation of the ADA.[115]

The Eighth Circuit applied the *McDonnell Douglas* burden-shifting framework because there was no direct evidence of

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[107] *See Office of Senate Sergeant at Arms*, 95 F.3d at 1106; *Teahan*, 951 F.2d at 516.

[108] *See Office of Senate Sergeant at Arms*, 95 F.3d at 1107.

[109] 42 U.S.C. § 12111(8) (2000); *see supra* Part II.C.2.

[110] Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1020 (8th Cir. 1998).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 1021.

discrimination.[116] The court, though, took a different approach than other courts as to the third element of a plaintiff's prima facie case of discrimination.[117] Instead of requiring the plaintiff to prove he was discriminated against "because of" his disability, the court only required proof that the adverse employment action was suffered "under circumstances from which an inference of unlawful discrimination arises."[118] Warner-Jenkinson argued that Young did not meet this element of the prima facie case because he had not demonstrated circumstances from which the existence of unlawful discrimination could be inferred.[119] The court disagreed, noting that "an inference of discrimination may be raised by evidence that a plaintiff was replaced by or treated less favorably than similarly situated employees who are not in the plaintiff's protected class."[120] The court also noted that the threshold of proof is minimal to establish a prima facie case.[121] It is intended to create a rebuttable presumption and "to sharpen the inquiry" to determine whether there has been intentional discrimination.[122] Discriminatory action need not be proved in the prima facie stage.[123]

The court concluded that Young had raised an inference of discrimination with evidence of Warner-Jenkinson's inconsistent explanations.[124] This shifted the burden of production to the company to establish a legitimate, nondiscriminatory reason for the adverse employment action, which it met despite the inconsistency of its reasons.[125] The burden was then shifted back to Young to prove Warner-Jenkinson's proffered reason was pretextual to the real reason of discrimination.[126] The court concluded that the inconsistency in Warner-Jenkinson's reasons created a genuine issue of material fact as to whether the reasons were a pretext to disability discrimination; therefore, summary judgment was denied.[127]

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116 *Id.*
117 *Id.* at 1021–22.
118 *Id.* at 1022.
119 *Id.*
120 *Id.* (quoting Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996)).
121 *Id.*
122 *Id.* at 1022 n.5 (internal quotation marks omitted).
123 *Id.* at 1022–23.
124 *Id.* at 1022.
125 *Id.*
126 *See id.* at 1022–23.
127 *See id.* at 1023.

Unlike the inflexible per se rules of the "Not Because of the Disability" and the "Because of the Disability" approaches, the "Inference of" approach allows employees to prove their prima facie case if they can offer circumstantial evidence that creates an inference that the adverse employment action was actually because of the alcoholism. This is a more flexible approach because it allows employers to offer the alcohol-related misconduct as a legitimate reason for the action, while also protecting employees from being pretextually discriminated against because of their alcoholism.

4. *Raytheon Co. v. Hernandez* and Its Effect on Alcohol-Related Misconduct

Although the United States Supreme Court has not explicitly ruled on whether disability-related misconduct is "because of" the disability, it has indirectly spoken on the issue.[128] In *Raytheon Co. v. Hernandez*, the Court considered the issue of disability-related misconduct.[129] The Court granted certiorari to decide "whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules."[130] Unfortunately, the Court never answered this question because it determined that the Ninth Circuit had applied a disparate impact analysis when it should have only applied a disparate treatment analysis.[131] Nonetheless, the Court provided guidance on what the proper approach may be to disability-related misconduct.

In *Raytheon*, the plaintiff, Joel Hernandez, was forced to resign in lieu of being discharged because he tested positive for cocaine while at work.[132] Over two years later he returned to Raytheon and applied for rehire.[133] Despite having a reference letter from his pastor and another from his Alcoholics

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[128] Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). Raytheon acquired the defendant employer in this case, Hughes Missile Systems Company, subsequent to the employer's decision not to rehire the plaintiff. *Id.* at 46–48 & n.1. In the Ninth Circuit, this case was captioned as *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030 (9th Cir. 2002). For the sake of clarity, this Article refers to the employer as "Raytheon" or "the employer" and to the case as *Raytheon Co. v. Hernandez*, its caption before the Supreme Court.

[129] *See Raytheon*, 540 U.S. at 46.

[130] *Id.*

[131] *Id.* at 54–55.

[132] *Id.* at 47.

[133] *Id.*

Anonymous counselor, Hernandez was not rehired.[134] Raytheon claimed it had a company policy against rehiring employees who had been terminated for misconduct, but Hernandez claimed it was because of his addiction, which violated the ADA.[135]

The Ninth Circuit agreed with the lower court that Hernandez had failed to timely raise his disparate impact claim; therefore, it only analyzed his disparate treatment claim under the *McDonnell Douglas* burden-shifting framework.[136] During this analysis, it determined that Hernandez had proved his prima facie case of discrimination because there were genuine issues of material fact regarding whether he was qualified for the job and whether he was not rehired because of his disability.[137] This shifted the burden to Raytheon, who contended that it had applied a neutral policy against rehiring employees previously terminated for violating workplace conduct rules, which was "a legitimate, nondiscriminatory reason" not to rehire Hernandez.[138] The Ninth Circuit found that the employer's no-rehire policy was lawful on its face; however, it found that "[this] policy was not a legitimate, nondiscriminatory reason" for not rehiring Hernandez because the policy unlawfully discriminated against drug addicts whose only work-related offense was failing a drug test due to their addiction.[139]

The Supreme Court found that the Ninth Circuit had erred by confusing the analytical frameworks for disparate impact and disparate treatment.[140] It had incorrectly applied a disparate impact analysis to a disparate treatment claim by holding "that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a

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[134] *Id.*

[135] *Id.* at 48.

[136] *See id.* at 49. The burden-shifting framework for a disparate treatment case starts with the burden on the plaintiff, who must prove a prima facie case of discrimination that he was a "qualified individual with a disability" and that he was terminated "because of" his disability. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). If plaintiff meets this burden, then the burden shifts to the defendant employer "to articulate [a] legitimate, nondiscriminatory reason" for its employment action. *Id.* If the employer meets this burden, then the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by demonstrating that the employer's proffered reason was pretextual. *Id.*

[137] *See Raytheon*, 540 U.S. at 49–50.

[138] *Id.* at 50–51.

[139] *Id.* at 51.

[140] *See id.*

policy has a disparate impact on recovering drug addicts."[141] The Supreme Court found that if the Ninth Circuit had applied the correct disparate treatment framework, it would have been clear that "a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA."[142] That would shift the burden back to the plaintiff to produce sufficient evidence from which a jury could conclude that the employer's stated reason was pretextual to the actual reason, disability discrimination.[143] The Supreme Court vacated the Ninth Circuit's judgment and remanded the case for a proper disparate treatment analysis.[144]

Although the Court did not rule on whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules, the Court did provide considerable guidance on which of the lower courts' approaches is correct.[145] One scholar has suggested that the Court implicitly rejected the *Teahan* "Because of the Disability" approach to disability-related misconduct.[146] This argument is based on the Court's note that referred to the Ninth Circuit's suggestion that it was a violation of the ADA to not rehire plaintiff because of his disability-related misconduct.[147] The Court stated that this suggestion was inconsistent with the Court's rejection of a similar argument in *Hazen Paper Co. v. Biggins*.[148]

In *Hazen Paper*, the Supreme Court held that terminating an employee to prevent his pension from vesting was not discrimination because of age under the Age Discrimination in Employment Act of 1967, even though pensions are empirically correlated with age.[149] The Court did not, however, preclude the

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[141] *Id.*

[142] *Id.* at 51–52.

[143] *Id.* at 52.

[144] *Id.* at 55.

[145] *Id.* at 51–55; Timmons, *supra* note 7, at 231.

[146] *See* Timmons, *supra* note 7, at 235.

[147] *Id.*; *see also Raytheon*, 540 U.S. at 54 n.6 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993)).

[148] Timmons, *supra* note 7, at 235; *see also Raytheon*, 540 U.S. at 54 n.6 (citing *Hazen Paper Co.*, 507 U.S. at 611).

[149] *Hazen Paper Co.*, 507 U.S. at 611–12. The Court explained that because employee pensions vested after a certain number of years of service, rather than at a specific age, the employer that terminated an employee to avoid the expense of pension-vesting would not make that decision based on age, but rather years of

possibility that an employer who acts on the assumption that there is a correlation between age and pensions vesting could be liable for age discrimination.[150] This seems to leave open the possibility that there may be an ADA claim when an employer assumes a correlation between alcoholism and excessive absenteeism, and then disciplines an employee based on that assumption. The employee would have to prove that his absenteeism was just a pretext to actually being fired for alcoholism.[151] As the Supreme Court only implicitly reached the issue of disability-related misconduct, it left open the possibility of several circuit court approaches.

B. Reasonable Accommodation

Retroactive accommodation is generally not required by most courts if employees have not notified the employer of their disability.[152] If an employee requests reasonable accommodation before the misconduct has taken place, however, and the accommodation will allow him or her to successfully adhere to performance and behavior standards, the employer must provide accommodation, unless it causes undue hardship.[153] This general rule "encourag[es] employees to seek diagnosis and treatment of their disabilities as soon as possible and to discuss with their employers likely difficulties in following workplace conduct rules before they arise."[154] This also reduces the incentive for employees, after they have been discharged, to claim they are disabled and should have been accommodated.[155] Other courts have provided a possible framework for employers to use in accommodating an alcoholic employee.[156] These courts require an employer to accommodate the alcoholic employee when it suspects the misconduct is related to alcoholism.[157]

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service. *Id.* at 610–12. The Court further stated that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609.

150 *Id.* at 612–13.

151 *Raytheon*, 540 U.S. at 52 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

152 Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1107 (Fed. Cir. 1996).

153 Timmons, *supra* note 7, at 283.

154 *Id.*

155 *Id.*

156 *See, e.g.*, Rodgers v. Lehman, 869 F.2d 253, 258–59 (4th Cir. 1989).

157 *Id.*

1. Under the "Five Step" Approach, the Duty to Accommodate Arises When Employer Suspects Misconduct Is Related to Alcoholism

Rodgers v. Lehman provides a possible framework for analyzing what the employer must do to reasonably accommodate an alcoholic employee.[158] In *Rodgers*, the plaintiff, John Rodgers, had a serious absenteeism problem that was caused by his alcoholism.[159] He refused outpatient treatment and counseling services offered by his employer on numerous occasions, despite his employer offering to readjust his work schedule to accommodate the program.[160] Rodgers finally made several voluntary attempts at treatment and attended Alcoholics Anonymous meetings, but he was unsuccessful at recovery.[161] After two suspensions failed to correct the misconduct, Rodgers was terminated.[162] He then brought a claim under the Rehabilitation Act.[163]

The Fourth Circuit held that when dealing with an alcoholic employee, the employer must follow a progressive course of action.[164] It set out the procedure an employer must follow when dealing with the problems of an alcoholic employee.[165] An employer should first inform the employee of available counseling services when it suspects that the job misconduct is related to alcoholism. If the misconduct continues, the employee should be provided with a "firm choice" between treatment and discipline, with the treatments suggested providing an opportunity for outpatient treatment, unless inpatient treatment is immediately necessary. At this point, the employer should impose progressive discipline for continued misconduct. If outpatient treatment fails, then the employee should be provided with opportunity for inpatient treatment, unless this would place an undue hardship on the employer. Finally, if the employee relapses after completing the inpatient treatment, his or her termination will

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158 *Id.*
159 *Id.* at 255.
160 *Id.*
161 *Id.* at 255–56.
162 *Id.* at 256.
163 *Id.* at 254.
164 *See id.* at 259.
165 *See id.*

be presumed reasonable and can only be rebutted if it was his or her first relapse after a prolonged period of abstinence.[166]

The court found that reasonable accommodation for the alcoholic was a balance between the "excessive sensitivity" of allowing the alcoholic continued treatment and opportunity to fail, and the "undue rigor" of firmly confronting the alcoholic with consequences for his actions.[167] The court determined that this proper balance could be best accomplished through the framework it laid out, allowing the alcoholic employee time to go through the process of dealing with the disability, while at the same time not allowing the process to continue forever.[168] The Fourth Circuit held that although Rodgers had been treated with extreme tolerance, he had been deprived of an opportunity to participate in inpatient treatment before being discharged.[169] The court therefore ordered that Rodgers be reinstated to his former position and given the appropriate ancillary relief.[170]

2. Under the "Employee Notification" Approach, the Duty to Accommodate Only Arises When Employee Puts Employer on Notice of the Disability

Subsequent to *Rodgers*, some courts rejected the idea that an employer has an obligation to accommodate alcoholic employees who have not asked for accommodation.[171] This rejection is based on the fact that *Rodgers* was decided before the 1992 amendments to the Rehabilitation Act, which incorporated the ADA provision that allows employers to hold alcoholic employees to the same standards as other employees.[172] In *Office of the Senate Sergeant at Arms*, discussed above,[173] the plaintiff argued that reasonable accommodation for his alcoholism was a "firm choice and a fresh start."[174] The employer argued that it was allowed to hold alcoholic employees to the same standards as

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166 *See id.*

167 *See id.*

168 *See id.*

169 *See id.* at 259–60.

170 *See id.* at 260.

171 *See, e.g.*, Burch v. Coca-Cola Co., 119 F.3d 305, 314 (5th Cir. 1997); Johnson, E.E.O.C. Dec. 03940100, 1996 WL 159072, at *3–4 (Mar. 28, 1996).

172 *Burch*, 119 F.3d at 320 n.14; *Johnson*, 1996 WL 159072, at *4.

173 *See supra* notes 95–109 and accompanying text.

174 Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1106 (Fed. Cir. 1996).

other employees under the ADA and the Rehabilitation Act and therefore, a "firm choice and fresh start" are not required.[175] It argued that retroactive accommodation would be treating alcoholic employees more favorably than other employees who violated workplace rules.[176]

The Federal Circuit found that a "firm choice" between treatment and discipline is consistent with reasonable accommodation of the alcoholic employee.[177] At the same time, it also found that the ADA does not require a "fresh start" through retroactive accommodation.[178] Furthermore, the court held that an employer's duty to reasonably accommodate only arises when the employer knows of the employee's disability.[179] Requiring retroactive accommodation when an employer had only partial, speculative, or hearsay knowledge, the court held, would be contrary to the plain language[180] and the legislative history of the statute.[181] Therefore, under the Federal Circuit's approach, employees who notify their employer of their alcoholism only after it has resulted in misconduct are not entitled to reasonable accommodation for their disability because the employer was not notified of the disability before the misconduct occurred.

III. ANALYSIS AND PROPOSAL

An alcoholic employee is limited to two of the three possible ADA claims. Therefore, it is extremely important to protect these two. To do this, courts must adopt the correct framework for analyzing disparate treatment and reasonable accommodation claims.

A. Disparate Treatment

Although the Supreme Court implicitly rejected the *Teahan* approach of a discharge because of disability-related misconduct

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175 *Id.*

176 *See id.*

177 *Id.* at 1107.

178 *Id.*

179 *See id.*

180 *See id.* at 1107. The plain language of the statute indicates that an employer's "duty to accommodate is triggered by its knowledge of the disability." *Id.*

181 *See id.* (discussing the legislative history and how "the legislation clearly states that employers are obligated to make reasonable accommodations only to the 'known' physical or mental limitations of an otherwise qualified individual with a disability").

being per se disparate treatment, the Court left open the possibility that in some situations there could be disparate treatment when the discharge is alleged to have only been because of disability-related misconduct.[182] In remanding the case, the Court stated that the only thing left to determine was whether the employer used its neutral no-rehire policy as a pretext for actually not rehiring the plaintiff for being a drug addict.[183] Further evidence that the Court may allow a disparate treatment claim when disability-related misconduct is used as a pretext to the actual reason for the adverse employment action is found in the statement made by the Court in *Hazen Paper*. There, the Court stated that discharging on the assumption of a correlation between pensions vesting and age may be found to be age discrimination.[184] This statement is analogous to an employer discharging an employee on the assumption of a correlation between absenteeism and alcoholism. The Supreme Court's statements in *Raytheon* and *Hazen Paper* are strong evidence of the importance of preventing employers from using disability-related misconduct as a pretext for an adverse employment action because of the employee's disability. To ensure that employers are prevented from doing so, it is vital that the correct framework is applied to a disparate treatment claim.

1. Problems with the "Not Because of Disability" Approach

A majority of courts separate the disability-related misconduct from the disability.[185] These courts hold that the disability-related misconduct is "Not Because of the Disability."[186] The problem with this approach is that it is a per se rule that fails to apply the *McDonnell Douglas* burden-shifting framework, which prevents employees from having the opportunity to prove pretext.[187]

The "Not Because of the Disability" approach leaves alcoholic employees, who are protected under the ADA, without a remedy when they are pretextually discriminated against because of

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[182] *See* Timmons, *supra* note 7, at 238–39.
[183] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).
[184] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612–13 (1993).
[185] *See* Pernice v. City of Chi., 237 F.3d 783, 787 (7th Cir. 2001).
[186] *Id.* at 786–87.
[187] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 806 (1973).

their disability. The ADA already explicitly prohibits alcoholics from bringing a disparate impact claim.[188] They can only get reasonable accommodation if they put the employer on notice of their alcoholism,[189] which many times they do not do until something happens. Additionally, under the "Not Because of the Disability" approach, they are incapable of proving a prima facie case of disparate treatment if the employer gives the misconduct as the reason for the action. This allows the employer to freely discriminate against alcoholic employees, as long as the discrimination is based on the employees' misconduct, and not due to their disability, regardless of whether the misconduct was a pretext to hide disability discrimination.

Take for example, an alcoholic employee who misses work because of alcoholism. The employee comes in the next day and notifies the employer that the reason for the absence was alcoholism. The employer fires him or her, saying it is against company policy to miss work without an excuse. However, other non-alcoholic employees have missed work without an excuse in the past and have not been fired. In this situation, we already know that the alcoholic is barred from a disparate impact claim. The employee did not notify the employer of the disability until after the misconduct, so according to some courts, the employee is barred from a reasonable accommodation claim.[190] If the "Not Because of Disability" approach is followed, the employee will be unable to prove that the discrimination was "because of" the disability, due to a lack of direct evidence. The employee will then be prevented from making out a prima facie case of disparate treatment. The employer will not be required to prove a legitimate, nondiscriminatory reason for the discharge, and the employee will not be given the opportunity to prove pretext. This leaves alcoholic employees, who are actually discriminated against "because of" a disability, without any claim at all, even though they ostensibly are protected by the ADA.

2. Problems with the "Because of the Disability" Approach

The *Teahan* court adopted an approach that an adverse employment action because of disability-related misconduct is

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188 42 U.S.C. § 12114(b) (2000).

189 *See* Burch v. Coca-Cola Co., 119 F.3d 305, 314, 319 (5th Cir. 1997).

190 *See id.* at 319; Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1107 (Fed. Cir. 1996).

per se "Because of the Disability."[191] There are three problems with this approach: (1) it has been implicitly rejected by the Supreme Court;[192] (2) it is inconsistent with the ADA;[193] and (3) it is unfair because it does not give employers the opportunity to use alcoholic employees' misconduct as a legitimate, nondiscriminatory reason for the adverse employment action.

First, the Supreme Court implicitly rejected the "Because of the Disability" approach to disability-related misconduct in *Raytheon*.[194] In *Raytheon*, the Court noted that any suggestion that the ADA is violated when an employee is not rehired because of his disability-related misconduct is inconsistent with the Court's rejection of a similar argument in a case involving the Age Discrimination in Employment Act of 1967. In that case, the Court held that termination to prevent a pension from vesting was not because of age, even though pensions are empirically correlated with age.[195] Because the Supreme Court would more than likely reverse any court applying the "Because of the Disability" approach, courts should not use it.

Second, the "Because of the Disability" approach is inconsistent with the ADA's provision that allows employers to hold alcoholic and drug-addicted employees to the same standards as other employees.[196] Eliminating the distinction between the disability-related misconduct and the disability prevents employers from holding these employees to the same standards. Even though this provision only explicitly prevents alcoholic employees from bringing disparate impact claims, by applying a rule that an adverse employment action based on the alcoholic's misconduct is per se "Because of the Disability," the employer is prevented from holding these employees to the same standards as other employees.

For example, assume that an employer has a policy against absenteeism and an alcoholic employee is absent from work because of his or her alcoholism. Applying the "Because of the Disability" approach, the employer would be prevented from taking action against the alcoholic employee because the conduct

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191 Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 517 (2d Cir. 1991).

192 Timmons, *supra* note 7, at 236; *see also* Raytheon Co. v. Hernandez, 540 U.S. 44, 55 n.6 (2003).

193 42 U.S.C. § 12114(b).

194 *Raytheon*, 540 U.S. at 55 n.6.

195 *Id.*

196 42 U.S.C. § 12114(c)(4).

was related to his or her alcoholism, even though it has a policy against this type of conduct. If the employer did take action, it would be liable for disparate treatment. The effect of this would be to prohibit the employer from holding the alcoholic employee to the same standards as it holds other employees, which the ADA expressly allows the employer to do.[197]

Third, an adverse employment action based on disability-related misconduct as per se "Because of the Disability" prevents the employer from offering the misconduct as a legitimate, nondiscriminatory reason. If disability-related misconduct and the actual disability are one and the same, then a termination "because of" this disability-related misconduct could never be a legitimate, nondiscriminatory reason. Using the previous example, imagine that alcoholism causes an employee to be absent from work. Under the "Because of the Disability" approach, this would be per se disability discrimination. The court would not even have to go through the *McDonnell Douglas* burden-shifting framework. Even if it did, the employer would be prevented from offering the employee's absenteeism as a legitimate, nondiscriminatory reason for the action because the alcohol-related absenteeism was already determined to be "Because of the Disability." The employer's reason for the adverse action cannot be "Because of the Disability" and legitimate and nondiscriminatory at the same time.

The effect of this would be to allow the employee to take to the jury any claim that he was discriminated against because of disability-related misconduct, as long as he could prove a question of fact as to whether he was "otherwise qualified with reasonable accommodation." As will be discussed below, this reasonable accommodation could be something as easy as time off to attend rehabilitation. Although an employee's prima facie case is a minimal burden, so is the employer's burden to prove a legitimate, nondiscriminatory reason.[198] The "Because of the Disability" approach makes the employer's burden more than minimal—maybe even impossible. Therefore, this approach should not be adopted.

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[197] *See id.*

[198] Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1022 (8th Cir. 1998).

3. Why the "Inference of" Approach Should Be Adopted

Under the burden-shifting approach, before having to establish pretext, the employee must establish a prima facie case of disability discrimination.[199] Most courts require that employees prove they were fired "because of" their disability,[200] which can be a difficult task for the employee who was fired allegedly for disability-related misconduct. Courts should abandon this "because of" requirement for a prima facie case and replace it with the "terminated under circumstances giving rise to an inference of disability discrimination" approach that some courts have used.[201] This "Inference of" approach would allow the plaintiff to prove discrimination with circumstantial evidence, which is the reason for the burden-shifting approach.[202] A "qualified individual with a disability" should be able to create this inference by showing a causal connection between the conduct he was allegedly fired for, and the disability.[203] This approach makes the per se "Because of the Disability" approach unnecessary because the plaintiff's prima facie case could be proved through the causal connection,[204] without prohibiting the employer from using the misconduct as a legitimate, nondiscriminatory reason.

Using this approach to a prima facie case would give employers the opportunity to prove a legitimate, nondiscriminatory reason for the action, while also protecting an alcoholic employee from being discriminated against pretextually. Allowing an alcoholic employee to establish a prima facie case by establishing a causal connection between his absenteeism and his disability would shift the burden to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action.[205] Unlike the per se "Because of the Disability" approach, here the defendant could articulate this simply by giving the misconduct/absenteeism as the reason for the action. This would shift the burden back to the plaintiff

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199 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973).

200 *See* Davidson v. Am. Online, Inc., 337 F.3d 1179, 1187–88 (10th Cir. 2003).

201 Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 395 (N.D. Iowa 1995).

202 Timmons, *supra* note 7, at 241.

203 *Id.*

204 *Id.*

205 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

to prove that the proffered reason was pretextual.[206] Pretext could be proved by providing evidence, such as non-alcoholic employees being treated differently for the same misconduct, which would allow a reasonable jury to find for the plaintiff. This "Inference of" approach to disability-related misconduct, unlike the two per se approaches, protects both the employer's right to prove a legitimate, nondiscriminatory reason for the adverse employment action, and the employee's right to prove that reason was a pretext for the actual reason, the disability. Therefore, this approach should be adopted by the courts.

Going through the proper burden-shifting framework may seem like a long and drawn out way to come up with the same result. Many times this framework will yield the same result, such as in cases where the employee engaged in egregious misconduct. However, the proper framework is necessary to protect the employees who have been discriminated against not because of their misconduct, but because of their disability. Using the "Not Because of the Disability" approach to strike down disability-related misconduct claims simply because there is no direct evidence that the employee was fired "because of" their disability would leave employers free to discriminate against the disabled by giving misconduct as the reason for the action. This would allow the employer to pretextually discriminate against employees because of their disability.

Alternatively, using the "Because of the Disability" approach would allow almost all disabled employees to tie up the courts by claiming the misconduct for which they were fired was a result of their disability, without having to prove that the employer used their misconduct as a pretext to terminate them because of their disability. Allowing so many meritless claims to establish a prima facie case would waste the courts' resources and be too burdensome on employers. Furthermore, the "Because of the Disability" approach has been implicitly rejected by the Supreme Court, it contradicts the plain language of the ADA, and it prevents the employer from using the misconduct as a legitimate, nondiscriminatory reason for the adverse employment action. The proper approach lies somewhere in the middle, only allowing disability-related misconduct claimants to establish a prima facie

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206 *Id.*

case if employees can show that they were fired under circumstances giving an "Inference of" disability discrimination.

B. Reasonable Accommodation

Discrimination against people with disabilities "cost[s] the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity."[207] It has been reported by the National Institute on Alcohol Abuse and Alcoholism that alcohol abuse costs the United States an estimated $185 billion dollars a year.[208] Almost half of this amount, an astounding $88 billion, comes from lost productivity at work caused by hangovers and other alcohol-related diseases.[209] This loss in productivity can be improved by adopting the proper approach to reasonable accommodation for the alcoholic employee.

1. Problems with the "Employee Notification" Approach

Some courts have rejected the idea that employers have an affirmative duty to provide reasonable accommodations to alcoholic employees without first being notified of the disability.[210] This approach fails to recognize some important facts about disabilities. Many people with a disability, especially alcoholism, are too embarrassed to reveal their disability. Furthermore, many disabled employees believe that they can hide their disability from their employer without having to go through the humiliation of disclosing it to the people they work for every day. They think the disability will not affect their job performance. Not only that, but many alcoholics are in denial about their disability. These employees would never ask for a reasonable accommodation for their disability because they do not believe they have one. Alcoholic employees are also less likely than other disabled employees to be familiar with the law. Because they do not think they are disabled, they are less likely than other disabled individuals to have learned about the

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[207] 42 U.S.C. § 12101(a)(9) (2000).

[208] Matthew Herper, *Cutting Alcohol's Cost*, FORBES.COM, Aug. 22, 2006, http://www.forbes.com/2006/08/22/healthdrinkingproblems_cx_mh_nightlife06_0822costs.html.

[209] *Id.*

[210] *See* Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1107 (Fed. Cir. 1996).

protections of disability law. They may believe that they can be discharged or not hired if the employer finds out they are an alcoholic. These alcoholic employees likely are afraid that the employer will take action against them because of their disability. Requiring employees to notify their employer ignores the facts about disabilities and cuts against the ADA's goals of ensuring disabled individuals with equal opportunity, full participation, and economic self-sufficiency.[211]

On the other hand, an employer could not reasonably be required to discover all of its employees' disabilities without being notified. Requiring employees to notify their employers of their disability and to request reasonable accommodation also encourages employees to seek treatment for their disability in order to prevent disability-related misconduct from occurring.[212] This also discourages non-disabled employees from claiming they needed accommodation for their disability only after their discharge.[213] These untruthful employees, however, would be discouraged in the same way if they were offered a "firm choice" between rehabilitation and termination. There would be few employees who would go through an extended stay at a rehabilitation treatment facility if they did not really need the treatment. Most legitimate alcoholic or drug-addicted employees do not even want to attend rehabilitation. Furthermore, most of these dishonest employees would be discovered by the psychiatric personnel at the rehabilitation clinic.

2. Why the "Five Step" Approach Should Be Adopted

The proper framework for reasonable accommodations of the alcoholic employee is the "Five Step" analysis from *Rodgers v. Lehman*.[214] In *Rodgers*, the Fourth Circuit used this approach to find a balance between "excessive sensitivity" and "undue rigor."[215] First, this requires the employer to let the employee know of the available counseling services when it suspects the misconduct is alcohol-related.[216] Suspicion of alcoholism could arise if the employee notified the employer of the disability or if

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211 42 U.S.C. § 12101(a)(8) (2000).
212 Timmons, *supra* note 7, at 283.
213 *Id.*
214 Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).
215 *Id.* at 259.
216 *Id.*

the employee's absenteeism was extensive enough that disciplinary actions could be taken. If the absenteeism was bad enough, the employer could notify the employee of the counseling services available, without accusing him or her of being an alcoholic.

Second, if the misconduct continued, the employer would then be required to offer the employee a "firm choice" between treatment and discipline.[217] Employees who denied being an alcoholic or admitted to being an alcoholic and refused treatment would be terminated. This would further the ADA's goals by providing alcoholic employees with the opportunity to seek help and keep their job, assuring them economic self-sufficiency. Non-alcoholic employees would have the opportunity to claim they were alcoholics; however, few would want to go through treatment when they did not need to and most of those who did would be discovered by the professionals at the treatment facilities and turned in to the employer.

The third step of the *Rodgers* analysis gives alcoholic employees who chose treatment the opportunity for outpatient treatment.[218] Fourth, the employee would progress to inpatient treatment if it was necessary.[219] The *Rodgers* framework, however, is not intended to be unlimited in duration. Under the fifth step of the analysis, employees who relapse into their alcoholic misconduct after completing inpatient treatment can be discharged, and the discharge will be presumed reasonable.[220] This presumption is only rebuttable if it is the first relapse after a prolonged period of abstinence.[221]

This method of providing reasonable accommodation to the alcoholic employee benefits employees as well as employers. The employees' benefits are obvious. They receive an opportunity to keep their jobs, which furthers the ADA's goal of allowing the disabled to be economically self-sufficient. They also get a chance at rehabilitation and now have an extra incentive to attend. Providing alcoholic employees with these accommodations, in turn, provides them with an equal opportunity to succeed in the workplace, furthering another goal of the ADA.

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217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.*

The "Five Step" approach is also advantageous to employers, though the benefits are not as obvious. Employers spend a substantial amount of money training employees, so losing one is very costly. Being able to keep these trained employees, even if they must provide time off during rehabilitation, will benefit employers in the long run by allowing them to save money and increase productivity. Attempting to rehabilitate alcoholic employees is a burdensome task, but it will save employers money, save the United States money, and further the goals of the ADA.

CONCLUSION

Alcoholic employees are protected under the ADA, but are expressly prohibited from bringing disparate impact claims. Therefore, courts must be cautious in protecting these employees' right to disparate treatment and reasonable accommodation claims. In order for alcoholics, a protected class under the ADA and Rehabilitation Act, to be adequately protected from disability discrimination, it is necessary for courts to apply the proper framework when analyzing their disparate treatment and reasonable accommodation claims.

Some federal circuits use a per se rule for disparate treatment claims that an adverse employment action because of disability-related misconduct is "Not Because of the Disability." This effectively bars alcoholic employees from bringing claims when the employer's stated reason for the action is alcoholic-related misconduct because the plaintiff lacks direct evidence that it was actually because of his disability. This prevents employees from having the opportunity to prove that the employer's reason was pretextual and allows the employer to discriminate. The Second Circuit has used a per se rule that an adverse employment action because of disability-related misconduct is "Because of the Disability." This approach has been implicitly rejected by the Supreme Court, goes against the ADA, and prevents employers from offering the misconduct as a legitimate, nondiscriminatory reason. Furthermore, this approach allows meritless claims to go to trial and ties up courts' resources. Outside the disability-related context, some circuits allow the plaintiff to prove his prima facie case if he can show he was terminated under circumstances creating an inference of disability-based discrimination. This Article argues that this

"Inference of" approach is the better approach because it allows employers to offer the employee misconduct as a legitimate, nondiscriminatory reason for the adverse employment action, and it prevents employers from using alcohol-related misconduct as a pretext for disability-based discrimination.

Some federal circuits require an employer to reasonably accommodate an alcoholic employee only when the employer has been put on notice of the disability and the employee has asked for an accommodation. Other circuits require reasonable accommodation when the employer suspects the misconduct is alcohol related. This Article argues that the better approach is to require the accommodation when the employer suspects the misconduct is alcohol related because it furthers the goals of the ADA by ensuring the disabled an equal opportunity, full participation, and economic self-sufficiency. This approach is also more beneficial to the employer in the long run, who receives a trained, more productive, non-disabled employee. Furthermore, this helps to deal with the problem of alcoholism and saves the United States money by helping alcoholics become rehabilitated and more self-sufficient.